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erty pass to the trustee, while those for personal injury do not.¹³ Failure to recognize that the kinds of damage form the test of the number of causes of action is frustrating this rule by allowing the bankrupt to sue for damage to property as well as the person, if caused by the same act.¹⁴

ESTOPPEL PREDICATED UPON INNOCENT MISREPRESENTATION. — Assuming the existence of the other elements¹ necessary to an estoppel by misrepresentation, the question whether the estoppel can arise when there has been only an innocent misrepresentation is one upon which the authorities are not unanimous. The statement that fraud is an essential ingredient of the misrepresentation is frequently made.² A determination as to the accuracy of the requirement is to be reached by recognizing and applying the fundamental principle upon which the whole doctrine of estoppel by conduct rests. That principle is simply this: that a man will be precluded from denying the truth of misrepresentations when to allow him to deny would be contrary to equity and good conscience.³ The doctrine, then, being broadly founded upon fairness, the inquiry now becomes whether the denial of an honest misrepresentation may ever be so unconscionable as to be prohibited. The fact that the subject is equitable in its nature makes this peculiarly a matter to be determined by all the circumstances of a particular case. There are, however, three general situations which in a broad way illustrate the question.

Suppose, first, that A innocently but mistakenly points out as the boundary between his lot and B's a line inside his own land, up to which B in reasonable reliance builds. On discovering his error A is estopped as against B to claim to the true line.⁴ "When one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss."⁵ To permit A now to repudiate his prior assertion would be to permit him to inflict upon B a palpable injustice and would be tantamount to sanctioning a fraud.⁶ Secondly, the question may arise when A, with no fraudulent intent, has so made it possible for X to make a successful misrepresentation that A's action may fairly be considered an efficient cause of the ensuing change of B's position. And here the result will be identical: thus when A, on sending his cattle to be pastured with X's herd, puts X's brand on them, he is estopped later to

¹³ See 24 HARV. L. REV. 396.

¹⁴ *Brewer v. Dew*, 11 M. & W. 625; *Rose v. Buckett*, [1901] 2 K. B. 449. But see *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127, 144; 15 HARV. L. REV. 229.

¹ See EWART, ESTOPPEL, 10; BIGELOW, ESTOPPEL, 5 ed., 570.

² *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 335. See *Crary v. Dye*, 208 U. S. 515, 521; BIGELOW, ESTOPPEL, 5 ed., 617.

³ *Horn v. Cole*, 51 N. H. 287, 289.

⁴ *Ross v. Ferree*, 95 Ia. 604; *Cornish v. Abington*, 4 H. & N. 549, 556. See *Jorden v. Money*, 5 H. L. Cas. 185, 212; EWART, ESTOPPEL, 94.

⁵ *Stevens v. Dennett*, 51 N. H. 324, 336. This statement is said to be "bed rock of universal principle, upon which all instances of equitable estoppel must be founded." See 2 POMEROY, EQ. JUR., 3 ed., § 805, n. 1.

⁶ By the loose statement that "fraud is essential to estoppel" is frequently meant no more than this: that to allow A to assert against B his right or title would now be equivalent to fraud. See *Rice v. Bunce*, 49 Mo. 231, 235.

claim them against B, to whom X mortgaged the whole herd.⁷ What is loosely termed "standing by" presents the third situation. If A, with full knowledge of the circumstances, chooses to remain passive and refrain from asserting his title when he sees his property sold by X, who assumes to own it, to B, an innocent purchaser, A is estopped later to claim it from B.⁸ Surely "he who has been silent as to his rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."⁹ A has acted dishonestly in consciously allowing his property to be used to consummate a fraud.¹⁰ But if A is ignorant of his right in the property, the question is entirely altered. In a recent case an illiterate old widower, wholly ignorant of his title to land of his deceased wife, which the children had sold after her death, later discovered and successfully asserted his right to an estate by the curtesy against the apparently innocent vendee. *Dotson v. Merrill*, 132 S. W. 181 (Ky.). Innocent non-negligent silence creates no estoppel,¹¹ not because it is honest — that is immaterial — but because the "stander-by" neither makes nor permits a misrepresentation.¹² He neither holds out nor conceals.¹³ His assertion of a subsequently discovered right therefore involves no contradiction of his previous conduct and is now wholly conscionable.

RECENT CASES.

ADVERSE POSSESSION — WHO MAY GAIN TITLE — RELATIVE OF REAL OWNER. — A owned Blackacre and Whiteacre. In 1889 he conveyed the latter to his son. At that time a building on Blackacre also covered a gore-shaped part of Whiteacre. After the Statute of Limitations had run, the land covered by this building was sold on foreclosure to C, who applied for relief from her bid on the ground that the mortgagor did not have title to the gore. *Held*, that relief should be denied. *Timmermann v. Cohn*, 44 N. Y. L. J. 1739 (N. Y., Sup. Ct., Jan. 1911).

The law is well settled that after the child attains maturity the father may acquire title against him by adverse possession. *Den v. Lane*, 2 N. J. L. 397. So the child may gain title against the parent. *New Haven Trust Co. v. Camp*, 81 Conn. 539. Although seldom mentioned, it would seem that the disability of infancy, without reference to the relation of the parties, would protect the child in the majority of cases. Again, the child could not be deprived of his right by the father's fraudulent concealment of the true state of the title. But beyond that the ordinary requisites of adverse possession should suffice. *Scarboro v. Scarboro*, 122 N. C. 234; *New Haven Trust Co. v. Camp*, *supra*. Hence

⁷ *Bank of Holdenville v. Kissare*, 22 Okla. 545. See EWART, ESTOPPEL, 95.

⁸ *Pickard v. Sears*, 6 Ad. & E. 469; *Gregg v. Wells*, 10 Ad. & E. 90. See 18 HARV. L. REV. 140.

⁹ *Per* Swayne, J., in *Morgan v. R. Co.*, 96 U. S. 716, 720.

¹⁰ Much of the confusion upon the necessity of fraud in the misrepresentation has arisen from stating the rule applicable in cases of passive misrepresentation or "standing by" as if it applied as well to every other case of estoppel.

¹¹ *Willmott v. Barber*, 15 Ch. D. 96.

¹² *Insurance Co. of North America v. Miller*, 24 Oh. Circ. Ct. 667. See EWART, ESTOPPEL, 88, 89.

¹³ It is obvious that other elements necessary to an estoppel are often absent in this class of cases.